

MV98-1

Tax Type: MOTOR VEHICLE USE TAX

Issue: Rolling Stock (Vehicle Used Interstate For Hire)

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Case No.
)	IBT No.
v.)	NTL No.
)	
TAXPAYER,)	Administrative Law Judge
Taxpayer)	Mary Gilhooly Japlon

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General James Dickett, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of TAXPAYER

SYNOPSIS:

This matter comes on for hearing pursuant to the timely protest by TAXPAYER (hereinafter "TAXPAYER" or "taxpayer") of Notice of Tax Liability ("NTL") No. XXXXX issued by the Department of Revenue (hereinafter "Department") on May 5, 1995 in the amount of \$8,841.00 for Use Tax, penalty and interest due on the purchase of buses, bus parts, consumable supplies and fixed assets for the period of April 1993. The taxpayer filed a timely protest thereto.

At hearing, WITNESS testified on behalf of the taxpayer. Specifically at issue is whether the taxpayer is entitled to the “rolling stock” exemption of the Use Tax Act on its purchases of three buses. The parties filed a Stipulation of Fact (Taxpayer’s Ex. No. 1). Subsequent to the hearing, they filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department’s prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a liability due and owing in the amount of \$6,771 for state Use Tax deficiencies, and penalty in the amount of \$678, for a total of \$7,449 for the period of April 1993. (Dept. Ex. No. 1; Tr. p.6).
2. The tax liability period is April 1993. (Dept. Ex. No. 1; Tr. p. 6).
3. TAXPAYER is an Illinois corporation located in VICTITIOUS CITY, Illinois. (Taxpayer’s Ex. No. 1, par. 1; Tr. p.9).
4. On April 2, 1985 the Interstate Commerce Commission granted TAXPAYER authority to operate as a common carrier, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting passengers in charter and special operations, between points in the United States. (Taxpayer’s Ex. No. 1, par. 2, Ex. 1; Tr. p. 10).

5. At issue herein is the Use Tax assessment on the taxpayer's purchase of three buses on April 27, 1993: Bus nos. 566, 567 and 568. (Taxpayer's Ex. No. 1, par. 4).
6. Stipulation Group Exhibit No. 2 consists of copies of trip invoices for bus no. 566. (Taxpayer's Ex. No. 1, par.6, Ex. 2).
7. Stipulation Group Exhibit No. 3 consists of copies of trip invoices for bus no. 567. (Taxpayer's Ex. No. 1, par. 7, Ex. 3).
8. Stipulation Group Exhibit No. 4 consists of copies of trip invoices for bus no. 568. (Taxpayer's Ex. No. 1, par. 8, Ex. 4).
9. The taxpayer's primary business within the State of Illinois is school transportation services. (Tr. p. 11).
10. Regarding the taxpayer's charter business operations, it consists of trips across the state line, as well as trips to the airports and trains stations within Illinois. (Tr. p. 10).
11. In 1993 and 1994 the taxpayer owned and operated approximately 150 buses. (Tr. p. 32).
12. About the time that the buses were purchased (April 1993), the taxpayer had contracts to service two major school districts, consisting of a number of schools, as well as a special education cooperative consisting of 10 school districts. (Tr. p. 33).
13. None of the schools or school districts serviced by the taxpayer during the audit period were located outside of Illinois. (Tr. p. 33).

14. During the school year for the period at issue, as well as in 1994 and 1995, approximately 150 buses were used on a daily basis by the taxpayer. (Tr. pp. 34-35).
15. Each bus (including the three buses at issue) typically would make two to three morning runs, possibly a noon run for half-day students, as well as two to three afternoon runs. (Tr. pp. 34, 35).
16. Approximately 90 percent of the taxpayer's business consists of making school runs. (Tr. p. 34).
17. Regarding bus no. 566 which was purchased in April 1993, the earliest date for which a trip invoice was tendered by the taxpayer is February 5, 1994. (Tr. pp. 35-36; Taxpayer Ex. No. 1, Stipulation Ex. 2).
18. Regarding the charter trips conducted by the taxpayer, over 90 percent of its charter trips are intrastate charters. (Tr. pp. 36-37).
19. Approximately 98 percent of the taxpayer's interstate charter trips are round trips, both beginning and ending in Illinois. (Tr. p. 37).

CONCLUSIONS OF LAW:

The Department prepared corrected returns for Use Tax liability pursuant to section 4 of the Retailers' Occupation Tax (hereinafter ROT) Act (35 **ILCS** 120/4). Said section is incorporated by reference in the Use Tax Act via section 12 thereof (35 **ILCS** 105/12). Section 4 of the ROT Act provides in pertinent part as follows:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. ... In the event that the return is corrected for any reason other than

a mathematical error, any return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.

Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy ... in the name of the Department under the certificate of the Director or Revenue. ... Such certified reproduced copy ... shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of three buses. The taxpayer asserts that the purchases are exempt from Use Tax based upon the “rolling stock exemption” as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:

- (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... (35 ILCS 105/3-55).

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 ILCS 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (See, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated that the taxpayer received a Certificate of Authority issued by the Interstate Commerce Commission on April 2, 1985 to operate as a common carrier in interstate commerce transporting passengers in charter and special operations.

Regarding the requirement that the “interstate carriers” must be “for-hire”, the administrative rules provide that “[t]he term ‘rolling stock’ includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)”. The exemption does not contemplate vehicles:

used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that is an interstate carrier for hire using rolling stock that transports persons or property moving in interstate commerce. The taxpayer has met the threshold requirement that it is an interstate carrier through the submission of the certificate of authority; it has proven that it was “for hire” through the submission of trip invoices documenting trips across state lines taken by the buses at issue. The taxpayer must now prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that its rolling stock (i.e., vehicles) transports for hire, “persons whose

journeys or property whose shipments originate or terminate outside Illinois” and therefore, qualifies for the rolling stock exemption.¹

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

- (c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.
- (d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier’s use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

The stipulation of record (Taxpayer’s Ex. No. 1) provides in paragraph four that the purchase date of the three buses at issue is April 1993. The certified correction of returns provides that the period covered by the NTL is April 1993. This information is of considerable consequence because the trip tickets that correspond to the three buses at issue and that comprise Stipulation Group Exhibit Nos. 2, 3 and 4 reflect trips that are all outside of the audit period, except for one trip made by bus no. 568 in 1993. All of the other trips represented by trip invoices occurred in 1994, 1995 and 1996. In the case of

¹ Chapter I, Section 130.340(a) of 86 Ill. Admin. Code provides that “... the Retailers’ Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce...” Subsection (d) provides in essence that in order for the rolling stock to be moving in interstate commerce, it must transport, for hire, “... persons whose journeys or property

Chicago and Illinois Midland Railway Company v. Department of Revenue, 66 Ill. App.3d 397 (1st Dist. 1978), the Court held that it is the audit period that is relevant in the determination of whether the rolling stock exemption is applicable. The rolling stock must have moved in interstate commerce during the taxable period. Applying the holding to the instant case would result in an analysis of 1993 trip invoices, only. It is obvious, therefore, from the following delineation of trips taken by each bus, that in 1993 only bus no. 568 made a trip across the state line. As subsequent years are dehor the taxable period, the evidence from those years cannot be considered.²

However, in an attempt to analyze all aspects of this case, it will be assumed that all the trip tickets proffered can be reviewed. Even accepting this proposition, there are other profound and fatal problems with the taxpayer's case. Stipulation Group Ex. No. 2 consists of 14 trip invoices pertaining to bus no. 566. Stipulation Group Ex. No. 3 consists of 18 trip invoices relating to bus no. 567. With respect to bus no. 568, 13 trip invoices were submitted by the taxpayer as evidence of the interstate trips made by said bus (Stipulation Group Ex. No. 4). It bears repeating that neither bus nos. 566 or 567 made any interstate trips during 1993. Bus no. 568 made only one trip during the taxable period. Bus nos. 566 and 567 each made two trips to or from O'Hare airport. However, each of those trips occurred outside the audit period.

This inconsiderable evidence submitted by the taxpayer as proof that it is entitled to the rolling stock exemption certainly does not support its position. Rather, it manifests

whose shipments, originate or terminate outside Illinois on other carriers. ..." Therefore, the rolling stock exemption itself is explicative of the phrase "interstate commerce".

² The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, *id.*, is pertinent to this matter in that the exemption is claimed by the taxpayer at the time of purchase. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the bus, by happenstance, for an exempt purpose six months, eight months or one year later.

the fact that the nature of TAXPAYER's business is the intrastate transportation of children for school districts in Illinois. The taxpayer's witness testified that during the period at issue, approximately 90 percent of the taxpayer's business consisted of making intrastate school runs. Each bus made approximately six school runs per school day. As there are approximately 180 school days per year, this amounts to about 1,000 school runs per year.

Even considering the trip tickets proffered outside the taxable period, each of the buses at issue made interstate trips consisting of significantly less than one percent of its total trips. For example, bus no. 566 made 14 interstate trips during the years 1993, 1994, 1995 and 1996. That is, it made 14 interstate trips out of 4,000 intrastate school trips during the same period. The interstate trips, therefore, amount to less than one-half of one percent of total trips for bus no. 566. Bus no. 567 made 18 interstate trips during the years 1993, 1994, 1995 and 1996, during which time approximately 4,000 school runs would have occurred. Again, the interstate trips amount to less than one-half of one percent of the total trips for said bus. Regarding bus no. 568, it made 13 interstate trips during a four year period, which would amount to less than one-half of one percent of total trips occurring in interstate commerce.

According to the taxpayer's own witness, of the ten percent of the business that constitutes charter trips, in excess of 90 percent of that consists of intrastate charter trips. The Department in its brief points out that the arithmetic reveals that less than one percent of TAXPAYER's total trips consist of interstate charter trips. That is, ten percent charter trips multiplied by less than ten percent interstate charter trips equals less than one percent.

Of course, not all of those interstate trips even qualify for the exemption as all but one were outside of the audit period. Others were nonqualifying trips as the rolling stock did not transport “persons whose journeys or property whose shipments originated or terminated outside Illinois” in that according to the taxpayer’s own witness, 98 percent of the interstate charter trips both began and ended in Illinois, the effect of which is one continuous journey. The number of trips that could even be considered as qualifying for the exemption, therefore, is so diminutive as to be inconsequential. Again, this is even the situation when the best case scenario for the taxpayer is deliberated, and the trips dehors the taxable period are considered. Certainly, when considering only the taxable period, one trip made by one bus does not even merit discussion of whether the exemption is applicable.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 ILCS 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax.

There is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states. Given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Due to the lack of any “substantial nexus” between the activity to be taxed and another state, any

attempt by another state to tax might well trigger Commerce Clause concerns. (*See, Complete Auto Transit, Inc. v. Brady, supra*).

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore utilized general principles of statutory construction in rejecting the “original intent and primary purpose” standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court therefore found that Burlington Northern’s physical movement across state lines 13 percent of the time, combined with the interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the “rolling stock” exemption.

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that “[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances... .” This appears to stem from

the court's determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington Court's determination that the preamble is meaningless and, therefore, merely superfluous.

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is ... intertwined with its intrastate use... ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business.

The business of Burlington Northern consists in great measure of the interstate movement of people and goods. On the other hand, judging from the percentage of use allocated to intrastate school runs, the nature of TAXPAYER's business is the transportation of children for school districts in Illinois. TAXPAYER has committed its resources to doing business within Illinois.

In the case of First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358 (4th Dist. 1980), the court opined that oral testimony concerning the taxpayer's interstate activities was insufficient to prove its claim of entitlement to the rolling stock exemption. The court denied the taxpayer the exemption due to the fact that it lacked documentary evidence to indicate the amount of eligible exempt interstate commerce in which it engaged. In a concurring opinion, Justice Green opined that the equipment at issue crossed on an "infrequent and irregular basis". There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

Certainly, in the case at bar, the body of facts that comprise the record indicates that during the taxable year, only one of the three vehicles at issue took any trips across the state line, and that occurred only one time. The other two vehicles did not take any trips across the state line or to or from the airport until subsequent years. Even though it is my determination that TAXPAYER is an interstate carrier for hire, it has not proven that its rolling stock transported persons whose journeys or property whose shipments originated or terminated outside Illinois during the year at issue. Trip tickets were presented for the three subsequent year. However, they indicate that each of the three buses took interstate trips that comprised less than one percent of its total trips. The testimony offered by the taxpayer's witness is consistent with the documentary evidence.

When granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd

Dist. 1995)). In the case at bar, TAXPAYER has failed to carry its burden of proof. It is therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the bus purchases.

RECOMMENDATION:

It is my recommendation that NTL No. XXXXX be affirmed in its entirety.

Enter:

Administrative Law Judge